Supreme Court of the United States

OCTOBER TERM, 1940

No. 584 14

COMMERCIAL MOLASSES CORPORATION,

Petitioner,

vs.

NEW YORK TANK BARGE CORPORATION, as Chartered Owner of the Tank Barge "T. N. No. 73",

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF ON BEHALF OF PETITIONER

D. ROGER ENGLAR,
T. CATESBY JONES,
LEONARD J. MATTESON,
EZRA G. BENEDICT FOX,
Counsel for Petitioner.

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Opinions Below

The opinion of the District Court is not officially reported. It is unofficially reported, however, in 1939 A.M.C. 673, and is printed in the Record (R. 246-264). Findings of Fact by the District Court, numbered from 1 to 47, with Conclusions of Law, numbered from 1 to 15, are also printed in the Record (R. 266-285). The opinion of the Circuit Court of Appeals is officially reported at 114 F. (2d) 248 and is printed in the record (R. 291-297).

Jurisdiction of This Court

This is a proceeding in Admiralty instituted in the United States District Court for the Southern District of New York by the New York Tank Barge Corporation (hereinafter referred to as respondent),* as chartered owner of the Tank Barge "T. N. No. 73," for limitation of or exoneration from liability for damages to a shipment of molasses resulting from the sinking of the barge "T. N. No. 73" at Pier 1, Hoboken, N. J., on October 24, 1937. On December 16, 1940 this Court granted certiorari on the petition of Commercial Molasses Corporation, the sole claimant in the limitation proceeding below (hereinafter referred to as petitioner) (R. 299). The jurisdiction of this Court is under Section 240 of the Judicial Code as amended by Act of February 13, 1925, U. S. Code, Title 28, Section 347, and under Article 3, Section 2, Clause 1, of the Constitution of the United States.

Statement of the Matter Involved

Your petitioner, as owner of the molasses, filed its claim in the limitation proceedings claiming damages for the loss of molasses which had been brought to Hoboken, New Jersey, by the M. V "Athelsultan," and which was being delivered by that vessel to the barge "T. N. No. 73." While the loading of the barge was in progress, the barge sank in smooth water without any external contact with any other vessel or object to account for the sinking.

* Because the proceedings below were instituted by a petition for limitation of liability, respondent in this court was in the lower courts designated and there referred to as the petitioner; whereas your petitioner on certiorari was there designated and referred to as claimant.

Your petitioner had a contract of affreightment with respondent for the carriage of molasses from vessel in New York harbor to petitioner's plant* (Finding 3, R. 266). The carriage involved in the instant case was under that contract. This contract contained an express warranty of seaworthiness (Finding 42, R. 278), and also a provision requiring petitioner to take out insurance for the account of respondent (Finding 43, R. 278).

The insurance which petitioner had on the cargo, was taken out by the United Molasses Company, Ltd., from whom the petitioner purchased the cargo "to be delivered by that company c. i. f. at a United States port into shore tanks or barges provided by the purchaser" (R. 162; Finding 44, R. 279). The insurance on the cargo did not inure to the benefit of the respondent (Finding 45, R. 279). On the contrary, it contained warranties that it should be free from liability to any carrier (Finding 44, R. 279):

> "It was stipulated at the trial that the claim of the Commercial Molasses Corporation herein, was made on behalf of the underwriters, who wrote the insurance for the United Molasses Co., Ltd. The Commercial Molasses Corporation was credited by United Molasses Co., Ltd. on account of the purchase price of the molasses, with the amount allowed for the loss by the underwriters. The claimant's losses were thus settled by the underwriters for the vendor, United Molasses Co., Ltd. Presumably the amounts credited to the claimant, equalled the loans of the underwriters to the United Molasses Co., Ltd., as provided for in the aforementioned clauses of the insurance policies" (Finding 46, R. 280).

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*The contract of affreightment with respondent was originally made by Dunbar Molasses Corporation, but petitioner had assumed it (Finding 3, R. 266).

Pursuant to the contract between petitioner and respondent, your petitioner notified respondent of the arrival of the M/V "Athelsultan" at Pier 1, Hoboken, New Jersey, laden with a cargo of molasses consigned to petitioner. Whereupon, on the evening of October 23, 1937, respondent sent the barge "T. N. No. 73" to receive a portion of the cargo (Finding 4, R. 266).

"T. N. No. 73," a single skin, steel tank barge, with four cargo tanks and two peak tanks (Finding 7, R. 267), had been built at some time during the period from 1916-1920 as an oil barge. The barge had, however, carried molasses "on numerous occasions," and had carried molasses for petitioner before this loss occurred (Finding 10, R. 267-8). The barge was brought alongside the "Athelsultan" between 8:30 and 9:00 P. M. on the evening of October 23, 1937, the discharging hose of the "Athelsultan" was coupled to the barge, and pumping began at 9:05 P. M. (Finding 11, R. 268).

The forward tanks of the barge were partially loaded first (Finding 12, R. 269), and later the after tanks were connected up for loading (Finding 15, R. 269). About 1:05 A. M. October 24th, while the after tanks were being loaded, the barge became submerged by the stern (Finding 15, R. 269), and remained with her stern submerged but with her bow suspended by her forward lines and ship's pumping hose until 6 A. M., when the lines and pumping hose gave way. The barge then sank (Finding 19, R. 270). Only a small part of the molasses was saved; and the value of the barge, after the salvage operations, was only $800 (Finding 20, R. 271).

There was no unusual condition of wind or sea to account for the sinking of the barge; nor was there any

evidence of any kind offered by respondent which the District Court considered to be an adequate explanation of the loss (Findings 21, 23, 25, 26, 27, R. 271-273; Conclusions 1, 2, R. 280).

Respondent contended that the sinking was caused by the negligence of the mate in overloading the after tanks of the barge. The District Court found: "I do not find the evidence sufficient to establish this as a fact" (Finding 28, R. 273).

As to the surveys of the barge when she was examined in her battered condition, after having been raised, the Court found:

> "All that could be said of them is that they failed to disclose the cause of the sinking and in view of the condition of the barge nothing more could have been expected" (Finding 25, R. 272).

The findings concerning the condition of the barge prior to the loading are contained in Finding 26 (R. 272, 273), from which it appears that during May, 1937, five months before the sinking, the barge had been on drydock and necessary repairs had been made, but since that time only visual examinations of the barge had been made. When the barge was inspected shortly before loading, the cargo tanks were covered with a skin of molasses (R. 273). There is uncontradicted testimony in the record that there were "around 1500 short rivets" in the barge (R. 193), and that whether such rivets were leaky could only be determined by testing them with a hammer and that the barge was not clean enough for that (R. 194).

In Conclusion 1 (R. 280) the District Court said:

> "When a boat sinks in smooth water and without external contact of any kind, there is a presumption

> of unseaworthiness. As I have found as a fact that there is not sufficient evidence to rebut this presumption, I find that this loss resulted from unseaworthiness. *The Emergency*, 9 F. Supp 484; *The Jungshoved*, 290 F. 733; *The Calvert*, 54 F. (2d) 494" (R. 280).

The District Court held, however, that the petitioner had failed to comply with the obligation contained in the contract of affreightment to supply insurance, and for that reason dismissed your petitioner's claim. Thereupon your petitioner appealed to the Circuit Court of Appeals for the Second Circuit.

Decision of the Circuit Court of Appeals

While the Circuit Court of Appeals for the Second Circuit affirmed the final decree of the District Court exonerating the vessel owner from liability, it reached that result on a different legal basis from that of the District Court. It did not pass on the question of the validity and effect of the insurance clause which was the sole basis upon which the District Court found in favor of the carrier (R. 297). In effect, it reversed on a point of law the ruling of the District Court as to the legal liability of the vessel owner for cargo damage resulting from the unexplained sinking of the barge in smooth water without any external contact with any other vessel or object (R. 296-297). In so doing, it did not disturb the findings of fact made by the District Court, but disposed of the case on the basis of those findings being valid, saying:

> "Therefore, since we cannot say that the finding was 'clearly erroneous' in holding that no conclusion was possible upon the issue; we are to dispose of the case with that as datum" (R. 293).

After stating that the cause of action was based upon a breach of the warranty of seaworthiness and that the "promisee has the burden of proving the breach (of the warranty of seaworthiness), by which we mean that, if the Judge is unable to make up his mind upon the issue, the promisee fails" (R. 295), it proceeded to say:

> "In all cases, therefore, where the shipper must show the ship unseaworthy, that duty remains upon him throughout. It is enough on his case in chief if he shows that she developed an unaccounted for defect early in the voyage, because it is reasonable to infer from that that the defect must have existed before, but he must lay any doubts which remain when the whole evidence is in" (R. 296).

The Court then concluded as follows:

> "We do not understand that the judge in declaring that he could not decide whether the barge was seaworthy, did not consider her unexplained sinking as part of the evidence before him; but that, on the contrary, having weighed everything, including her sinking when she did, he was left in doubt. He then took recourse to the presumption which he supposed to persist as a determining legal factor. So far as we can see, that was the exact equivalent of putting the burden upon the Barge Company to prove that the barge was seaworthy" (R. 297).

Since the Circuit Court of Appeals rested its decision upon the ground that your petitioner could not recover because it had not proved the barge unseaworthy in precise and specific respects, it did not decide the question as to whether petitioner had breached its contract with respondent when it failed to take out insurance covering the vessel owner's liability under the warranty of seaworthiness (R. 297).

Petition for Certiorari

In the petition for a writ of certiorari petitioner presented the following questions:

1. (a) Whether the presumption of unseaworthiness, which arises in favor of a cargo owner when a vessel sinks in calm weather, continues after the vessel owner has failed to rebut the presumption by reliable evidence? In other words, whether the presumption persists only when no evidence whatever is offered in rebuttal and does not persist when the evidence offered is found to be not "reliable" and of such a nature as to leave the Court to "sheer guess work in attempting to draw any conclusions" (Finding 40, R. 277-8)?

(b) Whether the presumption of unseaworthiness continues when the Court finds that the evidence offered to displace the presumption is not "sufficient" to establish negligence not associated with unseaworthiness (Finding 28, R. 273), which was the only cause for the sinking not connected with unseaworthiness suggested by the vessel owner, particularly where such evidence failed "to disclose the cause of the sinking" (Finding 25, R. 272)?

(c) Whether after such evidence is offered the cargo owner must by affirmative evidence establish unseaworthiness by precise and specific evidence of the nature thereof?

2. Whether in such case the burden of proof is not on the vessel owner to establish that his vessel was in fact seaworthy?

3. Whether the long line of decisions of this Court, and of the Circuit Courts of Appeal for the Third, Fourth, Fifth and Ninth Circuits holding that the burden is on the vessel owner in such a case to

establish seaworthiness of his vessel are now to be disregarded?

4. Whether owners of goods are to be required to insure against a vessel owner's negligence in failing to provide a seaworthy ship.

ARGUMENT

I.

In every contract for the carriage of goods by water there is a warranty of seaworthiness. The warranty is sometimes expressed and when not expressed, it is implied. It is absolute and any modification of the absolute nature of the warranty must be clearly expressed and confined within strict limits.

The warranty here was expressed and was in the following words:

> "The barge owners undertake and agree that the barges owned and/or chartered are tight, staunch, strong and in every way fitted for the carriage of molasses within the limits above mentioned and will maintain the barges in such condition during the life of this contract" (Finding 42, R. 278).

This warranty of seaworthiness relates to seaworthiness throughout the life of the contract and is in the usual form for such warranties. *Luckenbach* v. *W. J. McCahan Sugar Refining Co.*, 248 U. S. 139, 150; *Federal Forwarding Co.* v. *Lanasa* (C. C. A. 4), 32 F. (2d) 154, 155; *McIver & Co., Ltd.* v. *Tate Steamers, Ltd.*, (1903) 1 K. B. 362.

The warranty is absolute—*The Edwin I. Morrison*, 153 U. S. 199, where at pages 210, 211, this Court said:

"As said, on circuit, by Mr. Justice GRAY, in *The Caledonia*, 43 Fed. Rep. 681, 685: 'In every contract for the carriage of goods by sea, unless otherwise expressly stipulated, there is a warranty on the part of the ship owner that the ship is seaworthy at the time of beginning her voyage, and not merely that he does not know her to be unseaworthy, or that he has used his best efforts to make her seaworthy. The warranty is absolute that the ship is, or shall be, in fact seaworthy at that time, and does not depend on his knowledge or ignorance, his care or negligence.' In *The Glenfruin*, 10 P. D. 103, 108, the same rule is thus expressed by BUTT, *J.*: 'I have always understood the result of the cases from *Lyon* v. *Mells*, 5 East, 429, to *Kopitoff* v. *Wilson*, 1 Q. B. D. 377, to be that under his implied warranty of seaworthiness, the ship owner contracts, not merely that he will do his best to make the ship reasonably fit, but that she shall really be reasonably fit for the voyage. Had those cases left any doubt in my mind, it would have been set at rest by the observations of some of the peers in the opinions they delivered in the case of *Steel* v. *State Line Steamship Co.*, 3 App. Cas. 72.'"

The Caledonia, 43 Fed. 681, later came to this Court and was affirmed as *The Caledonia*, 157 U. S. 124.

See also:

The Irrawaddy, 171 U. S. 187, 190;
The Southwark, 191 U. S. 1, 6;
Oxford Paper Co. v. *The Nidarholm*, 282 U. S. 681, 684;
Earle & Stoddart v. *Wilson Line*, 287 U. S. 420, 426;
May v. *Hamburg*, 290 U. S. 333, 345;
Cullen Fuel Co. v. *Hedger Co.*, 290 U. S. 82, 88.

Clauses modifying a warranty of seaworthiness must be confined in strict limits. They cannot "be extended by latitudinarian construction or forced implication so as to comprehend a state of unseaworthiness, whether patent or latent, existing at the commencement of the voyage." *The Carib Prince*, 170 U. S. 655, 659.

That petitioner's cause of action against respondent was for the breach of the undertaking to supply a seaworthy ship was recognized by both lower courts (R. 258, 296). Such a cause of action is independent of the provision of the contract to carry the cargo safely.

This Court has held that if a vessel be unseaworthy at the time of the commencement of the voyage, the shipowner is liable for damages caused by the breach, and this is a liability which arises independently of the provisions of statutes relating to carriers, viz., The Harter Act. *The Southwark*, 191 U. S. 1.

In *Scrutton on Charter Parties*, 14th Ed. at page 100, the learned author in the course of his discussion of the warranty of seaworthiness said: "This implied undertaking arises not from the shipowner's position as a common carrier, but from his acting as a shipowner."

In *Kopitoff* v. *Wilson*, 1 Q. B. D. 377, at page 382, the Court dealt with the question at some length. It was argued that the warranty of seaworthiness did not impose an obligation which was more than a subordinate part of the more extensive liability attaching to carriers, and that it was by virtue of the obligation of the carrier to carry safely and securely that any liability under a contract of carriage arose. The Court rejected that argument and pointed out that the principle underlying the warranty of seaworthi-

ness always received a wider application, and that "the existence of the warranty in question on the part of a shipowner is asserted with reference to his character as such, and not as existing only in those cases in which he is also acting as a public carrier."

It follows that if the barge was unseaworthy, *i. e.*, if the vessel owner breached its express warranty of seaworthiness, respondent is liable for the resulting loss to cargo, unless the insurance provision of the contract excuses the respondent from liability.

II.

The barge was unseaworthy. A presumption of unseaworthiness arose in favor of the cargo owner when the barge sank in smooth water without any external contact.

It is well settled by a long line of decisions, that when a vessel sinks during loading, or shortly after sailing, in smooth water, without any visible or adequate cause to produce such an effect, the presumption is that she was unseaworthy. See *Work* v. *Leathers*, 97 U. S. 379, 380, where this Court said:

> "If a defect without any apparent cause be developed, it is to be presumed it existed when the service began. *Talcot* v. *Commercial Insurance Co.*, 2 Johns. (N. Y.) 124."

Talcot v. *Commercial Insurance Co.*, 2 Johns. (N. Y.) 124, cited in *Work* v. *Leathers*, rested upon the following passage in *Marshall on Insurance*, London, 1802, page 373:

> "But if a ship, within a day or two after her departure, become leaky and founder at sea, or be obliged to put back, without any visible or adequate cause to produce such an effect, the natural pre-

> sumption is, that she was not seaworthy when she sailed; and it will then be incumbent on the insured to shew the state she was in at that time."

In *The Jungshoved*, 290 Fed. 733, certiorari denied 263 U. S. 707, relied upon by the District Court, Judge HOUGH, speaking for the Circuit Court of Appeals for the Second Circuit, used the following picturesque language:

> "It follows that the fact stands uncontradicted that the Crown was tendered as suitable to carry the load for which her size fitted her, and under less than that load, in smooth water and calm weather, she sank; in the picturesque phrase of the water front, 'she just faded away' without explanation, then or since. This raises a presumption of unseaworthiness (*Dupont* v. *Vance*, 19 How. 162,* 15 L. Ed. 584; *The Kathryn B. Guinan*, 176 Fed. 301, 99 C. C. A. 639), which, though rebuttable, has not been met. Therefore the lighter and her owner are liable and may be held for damages if properly sued" (290 Fed. 734, 735).

In *Globe & Rutgers Fire Insurance Co.* v. *United States*, 105 F. (2d) 160, 164, certiorari denied 308 U. S. 611, the same Court announced the same doctrine. Judge PATTERSON in *The Emergency*, 9 F. Supp. 484, applied the same law.

To the same effect see *The Southwark*, 191 U. S. 1, 13, 14:

> "The testimony discloses an inspection upon the part of the carrier shortly before the sailing of the vessel, in which by superficial observation no defect in the refrigerating apparatus was discovered,

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* The circumstance that the citation of *Dupont* v. *Vance*, 19 How. 162, by Judge HOUGH in *The Jungshoved*, is a mistake and should have been *Work* v. *Leathers*, 97 U. S. 379, is unimportant. Judge LEARNED HAND says in the present case (R. 295) that the mistake arose because of misplaced quotation marks in *Oregon Round Lumber Co.* v. *Portland, &c., S. S. Co.*, 162 Fed. 912, 921. This is quite true, but we submit that the mistake is unimportant. It merely requires us to look to *Work* v. *Leathers* for authority rather than to *Dupont* v. *Vance*.

but the testimony also shows that but a short time after the sailing of the ship, within one to three hours, the apparatus broke down, and was repaired, and then broke down again, and during the voyage to Liverpool did not reduce the temperature of the storage room sufficiently to preserve the meat, which was found to be in a very bad condition upon the opening of the refrigerating box at Liverpool. This sudden breakdown when the vessel was scarcely out of port would raise the presumption of unseaworthiness at the time of the sailing, making it incumbent upon the vessel owner to prove seaworthiness, and this independently of the provisions of the Harter Act. *Work* v. *Leathers*, 97 U. S. 379."

The rule is supported by an unbroken line of decisions of this Court and of the lower federal courts, as well as of the state courts.

The Edwin I. Morrison, 153 U. S. 199, 212;
Pendleton v. *Benner Line*, 246 U. S. 353;
Cort v. *Insurance Co.*, 2 Wash. C. C. 375, F. C. No. 3257;
The Planter, 2 Woods 490, F. C. 11207a;
Barnewall v. *Church*, 1 Caines 217, 234;
Paddock v. *Franklin Ins. Co.*, 11 Pick. 226, 237;
Walsh v. *Washington Ins. Co.*, 32 N. Y. 427, 436-7;
The Arctic Bird (D. C. Cal.), 109 F. 167, 170;
Oregon Round Lumber Co. v. *Portland & Asiatic S. S. Co.* (D. C. Oregon), 162 F. 912, 920-21;
Forbes, et al. v. *Merchants Exp. & Transp. Co.* (D. C., E. D. N. Y.), 111 F. 796, 800, affirmed (C. C. A. 2d), 120 F. 1019;
S. C. Loveland Co. v. *Bethlehem Steel Co.* (C. C. A. 3), 33 F. (2d) 655;
The John Twohy (C. C. A. 3), 279 Fed. 343, 344 (reversed on other grounds, 255 U. S. 77);
Bank Line, Ltd. v. *Porter* (C. C. A. 4), 25 F. (2d) 843, 845, certiorari denied 278 U. S. 623;

Gardner et al. v. *Dantzler Lumber & Export Co., Inc.* (C. C. A. 5), 98 F. (2d) 478, 479;

Pacific Coast S. S. Co. v. *Bancroft-Whitney Co., et al.* (C. C. A. 9), 94 Fed. 180, reversed on other grounds 180 U. S. 49;

U. S. Metals Refining Co. v. *Jacobus* (C. C. A. 2), 205 Fed. 896;

The Transit, 250 Fed. 71, 72;

The Fort Gaines, 24 F. (2d) 849, 851;

The Harper No. 145 (C. C. A. 2), 42 F. (2d) 161, certiorari denied 282 U. S. 875;

The Calvert, 51 F. (2d) 494 (C. C. A. 4);

The Cullen No. 32, 62 F. (2d) 68, affirmed 292 U. S. 82;

Societa Anonima Cantiero Olivo v. *Federal Ins. Co.* (C. C. A. 2), 62 F. (2d) 769, certiorari denied 289 U. S. 759;

Flat-Top Fuel Co. v. *Martin* (C. C. A. 2), 85 F. (2d) 39.

The Circuit Court of Appeals recognized that the cases support the presumption. It cited some sixteen cases to that effect in its opinion (R. 295). It said, however, these cases need not be taken "as necessarily intended to mean that it is the owner which must persuade the court of the ship's seaworthiness" (R. 295). In referring to certain cases, particularly to *Harper No. 145*,* 42 F. (2d) 161, certiorari denied 282 U. S. 875, the Court remarked that it is notorious that Judges often speak of the burden of proof when they mean no more than "that, if the trial had

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* Erroneously referred to by the Circuit Court of Appeals as *The Harper No. 193*. In that case the Circuit Court of Appeals for the Second Circuit had said: "The owner has the burden of proving that his barge was seaworthy when the cargo of chalk was loaded. The leaking and capsizing on August 28 raised a presumption of unseaworthiness" (42 F. (2d) 163).

ended with the evidence that is said to 'shift' the 'burden,' that party would lose to whose shoulders it had been shifted'' (R. 296).

III.

The presumption of unseaworthiness established by proof that the barge sank in smooth water without any external contact continued. It has not been rebutted by any substantial proof. Substantial proof means reliable testimony, well founded testimony, valuable testimony. The District Court held that the testimony offered in rebuttal of the presumption here was unreliable, not well founded, and valueless.

In the case at bar the Circuit Court of Appeals erroneously ruled that the presumption of unseaworthiness, or rather the inference that the loss was occasioned by unseaworthiness, arising from the uncontradicted evidence that the barge had sunk in smooth water without any external contact, did not continue after the vessel owner offered testimony as to other possible causes of sinking even though such testimony on examination was found to be unreliable and not well founded and inadequate to establish any cause for the barge's sinking other than unseaworthiness. This results in a complete nullification of the long established presumption of unseaworthiness above referred to in every instance where the vessel owner offers any testimony whatsover, no matter how flimsy and valueless such testimony may be. Such a ruling was clearly contrary to all previous authority.

The situation presented here is almost exactly like that in *Pendleton* v. *Benner Line*, 246 U. S. 353, where this

Court approved the conclusions of both courts below when they held that the unseaworthiness had been proved.

The District Court in the *Pendleton* case held:

> "I have no doubt that her owners believed her to be seaworthy. But facts in such a case speak louder than words, and the facts that she sprang so bad a leak on the first night of heavy weather that occurred upon her voyage, and that there is no adequate explanation given of it, is, in my opinion, not consistent with her being seaworthy at the beginning of the voyage." (*Benner Line* v. *Pendleton*, 210 F. 67, at p. 70.)

There was testimony in that case of striking a floating object, but the Court rejected that testimony, just as the District Court here rejected the testimony concerning negligent loading.

The Circuit Court of Appeals in the *Pendleton* case affirmed the finding of unseaworthiness made by the District Court. After reviewing testimony as to the vessel's seaworthiness, and commenting upon testimony where witnesses had said "that she was 'in first class condition,' 'one of the finest vessels' the witness had ever seen, and 'fit to go around Cape Horn' " (217 F. 501) and after concurring with the District Court as to the unreliability of the testimony in support of the shipowner's explanation of the sinking, the Court said:

> "The fact that the vessel sprang so bad a leak, and that no satisfactory explanation of the fact has been made, indicates to us, as it did to the court below, that the vessel was not seaworthy as to her hull at the beginning of the voyage." (*Benner Line* v. *Pendleton*, 217 F. 497, 503.)

There, as here, the ground of the suit was unseaworthiness. In commenting upon the conclusions below, this Court, speaking through HOLMES, *J.*, said:

> "The ground of the suit is that the vessel was unseaworthy at the beginning of the voyage and that by reason thereof she sank and her entire cargo was lost. Both courts below held that the unseaworthiness was proved, and on the evidence that question may be laid on one side." (*Pendleton* v. *Benner Line*, 246 U. S. 353, 354.)

In the present case, as in the *Pendleton* case, the ship sank without any apparent cause; testimony was offered in that case to prove that the loss was due to something other than unseaworthiness, but this testimony was not convincing. Therefore, the situation presented in the case at bar is identical with the situation presented in the *Pendleton* case, and the result should be the same.

The vice in the reasoning of the Circuit Court of Appeals lies in its assumption that the District Court had doubt as to the correctness of its finding that the barge was unseaworthy.* We submit that the findings and conclusions of the District Court give no ground for this assumption.

In its Conclusion 1 the District Court made the unequivocal finding "that this loss resulted from unseaworthiness" (Conclusion 1, R. 280). In Conclusion 2 it stated that the best that could be said on behalf of respondent was "that the cause of the accident has been left in doubt." These statements are not irreconcilable. The second statement does not detract from the first, and in

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* Judge LEARNED HAND wrote: "The finding that the 'cause of the accident has been left in doubt,' means, we take it, that the evidence as to whether or not the barge sank because of unseaworthiness, was so evenly matched that the judge could come to no conclusion upon the issue" (R. 293).

making it the Court did not indicate that it had any doubt concerning the cause of the loss. It knew it was unseaworthiness because on the proof no other inference was possible. It is true that no one could say whether the unseaworthiness related to the bottom, or to the sides, or to the deck of the barge; nor was there proof as to what aperture water got through into the tanks inside the barge. But lack of such proof does not affect your petitioner's case, for your petitioner had already proved its case when it showed a sinking without any external cause.

The words quoted by the Circuit Court of Appeals (R. 293) from the Conclusion 2 of the District Court have been lifted from their context (R. 280). When read in their context, they do not have the meaning stressed by the Circuit Court of Appeals. Moreover, these words are discussed by the Circuit Court of Appeals without regard to the specific findings of fact which the District Court had made before reaching Conclusion 1 (R. 270, 273, 275, 278, 280).

The following facts were established to the satisfaction of the District Court:

1. The barge sank in smooth water (Conclusion 1, R. 280).

2. The sinking occurred "without any external contact of any kind" (Conclusion 1, R. 280).

3. The sinking occurred during loading (Finding 19, R. 270-271).

4. The respondent alleged that the sinking was caused by negligence of the mate in overloading the after tanks of the barge. The Court found: "I do not find the evidence sufficient to establish this as a fact" (Finding 28, R. 273).

5. Respondent's employee, the mate, and respondent's experts gave testimony which led the Court to say that their testimony was a matter of speculation only (Finding 34, R. 275). The mate's contradictory statements as to freeboard and as to time of change from filling the forward tanks to the after tanks, made a most unfavorable impression on the District Court. The Court found that "neither statement of the mate is reliable and we are left to sheer guess work in attempting to draw any conclusions from his testimony" (Finding 40, R. 278).

6. The Court rejected the testimony of respondent's experts as to negligent loading because their estimates and conclusions were not well-founded (Finding 35, R. 275), and in Finding 41 the District Court referred to their computations as valueless.

These findings are definite. Their meaning is not doubtful. We respectfully submit that they do not justify the statement of the Circuit Court of Appeals that the District Court was in doubt as to the facts. Conclusion 1 (R. 280) was not without foundation. It had the very solid foundation of the facts which we have just enumerated. In that conclusion the District Court said:

> "1. When a boat sinks in smooth water and without external contact of any kind there is a presumption of unseaworthiness. As I have found as a fact that there is not sufficient evidence to rebut this presumption, I find that this loss resulted from unseaworthiness. *The Emergency*, 9 F. Supp. 484; *The Jungshoved*, 290 F. 733; *The Calvert*, 51 F. (2d) 494."

After arriving at that conclusion, the District Court dealt with respondent's contentions, and in disposing of them said:

> "2. The fact that the best that can be said of the state of the record is that the cause of the accident has been left in doubt does not help the petitioner (respondent here) in these limitation proceedings, because from that doubt the law draws a presumption of unseaworthiness which deprives petitioner (respondent) of the right to limit liability to the value of the barge and her freight then pending" (Conclusion 2, R. 280).

In this sentence the District Court is merely pointing out that even taking the most favorable view of the respondent's evidence, it finds it insufficient to overcome the presumption of unseaworthiness. It is significant that this sentence, as it was originally used in the District Court's opinion (R. 258), follows immediately after the District Court's discussion of the evidence which it subsequently reduced to findings enumerated above (pp. 19-20). A reference to that discussion will dispel any doubt as to what the District Court meant (R. 253-258). The Court's finding of unseaworthiness was based upon facts which compelled that conclusion, viz, the sinking during loading in smooth water, when there was no contact between the barge and any vessel or object of any kind to account for the sinking. Respondent was unable to offer any reliable or substantial evidence to explain the sinking. The conclusion of the District Court as to unseaworthiness was in full accord with that of this Court in *Del Vecchio* v. *Bowers*, 296 U. S. 280, and *New York Life Insurance Co.* v. *Gamer*, 303 U. S. 161, 170, which the Circuit Court of Appeals cited against the District Court. In those cases this Court held that the effect of the presumption persisted until substantial proof to the contrary is introduced. Here no substantial proof was offered to the contrary. In *Pendleton* v. *Benner Line, supra*, the un-

reliable evidence of a mate was rejected. This court did not suggest, as the Circuit Court of Appeals ruled here, that the mere offering by respondent of such testimony prevented the presumption from continuing and controlling.

An examination of the English cases, relied upon by the Circuit Court of Appeals, shows that they do not support its decision. The House of Lords in *Lindsay* v. *Klein*, 1911 A. C. 194, does not support the propositions argued in the opinion of the Circuit Court of Appeals. In that case Lord LOREBURN said:

> "If this ship was seaworthy, what occurred to her almost immediately after she left port is quite unaccountable, and it is the shipowner's business to account for it if he can in some way which shall displace the natural inference" (1911 A. C. 197).

And Lord SHAW of Dunfermline said:

> "My lords, in the judgments stress is repeatedly laid upon the fact that the onus of proving unseaworthiness is upon those who allege it. This is, of course, a sound doctrine; and it is none the less sound although the vessel break down or sink shortly after putting to sea. That is the principle of law. But the enunciation of that proposition does not impair or alter certain presumptions of fact, such presumptions, for instance, as those which arise from the age, the low classing, or non-classing, the non-survey of ship or machinery, the refusal to insure, the laying up, the admitted defects, and generally the poor and worsening record of the vessel, together with finally the breakdown, say, of the machinery, immediately, or almost immediately, on the ship putting to sea. It would be a very curious, and, in my opinion, an unreasonable and dangerous, thing if circumstances like these did not raise presumptions to which, especially taken cumulatively, effect were not to be given in Courts of law.

The last circumstance mentioned is a very familiar example. In the language of Lord REDESDALE in *Watson* v. *Clark* (1 Dow. 336, 348), decided nearly a century ago, 'He had always understood it to be a clear and distinct rule of law that if a vessel in a short time after leaving the port where the voyage commenced was obliged to return, the presumption was that she had not been seaworthy when the voyage began, and that the *onus probandi* was in such cases thrown upon the assured.'

Lord ELDON, in the same case, was even more emphatic: 'When the inability of the ship to perform the voyage became evident in a short time from the commencement of the risk, the presumption was that it was from causes existing before her setting sail on her intended voyage, and that the ship was then "not seaworthy," and the *onus probandi* in such a case rested with the assured to shew that the inability arose from causes subsequent to the commencement of the voyage' " (1911 A. C. 203, 204).

and again he said:

"In short, the whole evidence in the case must be weighed, and when those alleging unseaworthiness prove a mass of facts such as I have mentioned, and such as appear in this case bearing upon the record of a vessel which founders or breaks down shortly after setting sail, they start with a body of evidence raising a natural presumption against seaworthiness, which presumption, however, may of course be overborne by proof that the loss or damage to the vessel occurred from a cause or causes of a different character. My Lords, I venture humbly to think that had due effect been given to the above mentioned principles, certain of the difficulties which appeared to the learned judges below would have been found less formidable, and that the review of the evidence would have resulted in a verdict for the defenders." *Lindsay* v. *Klein*, 1911 A. C. 205.

A careful reading of this decision, we submit, does not warrant the statement in the opinion of the Circuit Court of Appeals (R. 294) that Lord SHAW of Dunfermline overruled *Watson* v. *Clark* (1 Dow. 336, 348). On the contrary, Lord SHAW of Dunfermline expressly held that there is a presumption of unseaworthiness when there is a breakdown of a vessel shortly after leaving port and he condemned the lower Court for not giving effect to it under the circumstances of that case.

The facts in *Pickup* v. *Thames & Mersey Marine Insurance Co., Ltd.*, 3 Q. B. D. 594 (1878), much relied upon by the Circuit Court of Appeals, were: The ship "Diadem," after loading a cargo of rice at Rangoon, sailed for England. Five days after leaving Rangoon the vessel encountered severe squalls and a heavy sea, and labored heavily and made much water. These conditions persisted for six days. The master and crew, becoming alarmed as to the safety of the ship, determined to return to Rangoon. The question before the jury was whether the leaking of the vessel was due to the rough weather which the vessel had encountered after leaving Rangoon or to unseaworthiness. At the conclusion of the summing up the jury retired to consider their verdict, and after a protracted absence returned to the Court, asking the Judge to give them more precise directions. The Court then instructed the jury that, if the inability of the ship to proceed on the voyage became evident in a short time after her sailing, the presumption of law under the facts of the case was that the inability arose from causes existing before she set sail, and that in such event the burden of proof becomes shifted and that it then rested upon the assured to show that the inability arose from causes occurring subsequent to the commencing of the voyage. The Court went further and directed the jury as a matter of law that the time which had elapsed

between the departure of the ship from Rangoon on the 4th day of June and her putting back on the 15th, was a sufficiently short time to shift the onus of proof, and to make it incumbent on the assured to satisfy the jury the unseaworthiness of the vessel arose from causes occurring subsequently to her setting sail on the voyage. When the case came before the full Queen's Bench, a new trial was ordered, on the ground that the facts did not warrant the direction. The Court, however, recognized that "if a vessel very shortly after leaving port founders, or becomes unable to prosecute her voyage, in the absence of any external circumstances to account for such disaster or inability the irresistible inference arises, that her misfortune has been due to inherent defects existing at the time at which the risk attached" (at p. 597). It pointed out that the ship had not been at sea for a short time. She had been at sea eleven days before she put back. It pointed out further that even assuming that the shortness of time intervening between the departure and her inability to keep the sea was sufficient to raise an inference of unseaworthiness, sight could not be lost of the fact that during that period the vessel encountered severe weather. The circumstance that the vessel leaked after she put to sea, was not one which compelled an irresistible inference, because during the period after leaving port the vessel had encountered severe weather, which might have been sufficient to account for the sinking. This judgment of the Queen's Bench Division was affirmed by the Court of Appeal. Brett, *J.* was careful not to depart from *Watson* v. *Clark*, 1 Dow. 336, 348, and pointed out that in the absence of any proof of a violent storm or extraordinary peril of the sea, the leaking of a vessel shortly after sailing did raise "the fair and natural presumption" "that it arose from causes existing before the setting out on her voyage, and, consequently, that she

was not seaworthy when she sailed" (at p. 600). The Court pointed out that because there was proof of a violent storm and extraordinary perils of the sea, the presumption did not arise in that case.

The Circuit Court of Appeals also cited *Ajum Goolam Hossen & Co.* v. *Union Marine Insurance Company, Ltd.*, 1901 A. C. 362. In that case a suit was brought on four policies of insurance on cargo which had been shipped on board the S. S. "Taif," to be carried from Port Louis, Mauritius, to Bombay. The underwriters defended on the ground that the ship was unseaworthy when she sailed from Mauritius. The vessel capsized and sank in less than twenty-four hours after she left port, without having encountered any storm or other known cause sufficient to account for the catastrophe.

There was strong evidence to show that the ship was lost, not through unseaworthiness, but through the negligence of her crew in failing to take the necessary navigational precautions to protect her after the danger from incoming seas had become apparent to her crew. The Privy Council's conclusions were summed up in these words:

> "Their Lordships are of opinion that the evidence tends more strongly to shew that the loss of the ship was attributable to mistakes made in her management after she sailed, rather than to her unseaworthiness when she sailed. The balance of the evidence is against rather than in favour of unseaworthiness at that time" (1901 A. C. 370).

Lord LINDLEY, who delivered the judgment, said that:

> "If nothing more were known, *unseaworthiness at the time of sailing would be the natural inference to*

draw; there would be a presumption of unseaworthiness which a jury ought to be directed to act upon, and which a Court ought to act upon if unassisted by a jury. But if, as in this case, other facts material to the inquiry as to the seaworthiness of the ship *are proved*, those facts must also be considered; and they must be weighed against the unaccountable loss of the ship so soon after sailing, and unless the balance of the evidence warrants the conclusion that the ship was unseaworthy when she sailed, such unseaworthiness cannot be properly treated as established, and the defense founded upon it must fail" (1901 A. C. at p. 366). (Italics ours.)

In the case at bar the other facts were not proved (Finding 28, R. 273). The reason they were not proved is that the District Court found that the evidence offered in their support was unreliable, not well founded, and valueless.

Before closing the discussion under this heading, we call to this Court's attention the thorough discussion of the principles involved in *S. C. Loveland Co.* v. *Bethlehem Steel Co.* (C. C. A. 3), 33 F. (2d) 655, where the legal situation was identical with that which existed here. There, as here, the vessel owner was not a common carrier. The cargo owner based its claim for recovery against the shipowner upon breach of the warranty of seaworthiness. The proof of unseaworthiness consisted of testimony "that the lighter filled and sank without any reason then apparent. She just sank" (33 F. (2d) 657). The Circuit Court of Appeals for the Third Circuit held that the presumption of unseaworthiness arising from such proof could not be met "by merely showing such a state of facts that the court is unable to discover how the disaster occurred" (33 F. (2d) 657), and that when such a situation is the result, even if

the vessel owner's proof is accepted as true, then the presumption persists and the facts upon which the presumption rests are a proper basis for finding the vessel unseaworthy. The Court said at 33 F. (2d) 657:

> "The Loveland Company, thus confronted by the presumption and being driven to rebut it, set about the task of proving the lighter's seaworthiness. This became purely an issue of fact. * * * Evidence of previous good condition has some probative value and therefore is admissible in rebutting the presumption of unseaworthiness, but clearly it is not enough alone. A party rebutting the presumption must show affirmatively that the damage was caused by a peril of the sea or other things excepted by the contract of affreightment and cannot absolve himself from blame by merely showing such a state of facts that the court is unable to discover how the disaster occurred, or that it might have occurred from something which, if only it were known, is a peril of the sea. *Work* v. *Leathers*, 97 U. S. 379, 24 L. Ed. 1012; *The Queen* (D. C.) 78 F. 155; *Sanborn* v. *Wright & Cobb Lighterage Co.* (D. C.) 171 F. 449; *Tucker Stevedoring Co.* v *Southwark Manufacturing Co.* (C. C. A.) 24 F. (2d) 410."

So also in the Fourth Circuit, it has been held in *Bank Line, Ltd.* v. *Porter* (C. C. A. 3), 25 F. (2d) 843, 845, certiorari denied 278 U. S. 623, that:

> "If there is any doubt as to the seaworthiness of the vessel, that doubt 'must be resolved against the shipowner and in favor of the shipper.' *The Southwark*, 191 U. S. 1."

And in the Ninth Circuit in *Pacific Coast S. S. Co.* v. *Bancroft-Whitney Co.* (C. C. A. 9), 94 F. 180, reversed on other grounds 180 U. S. 49, the Circuit Court of Appeals applied the same principles. The situation in that case was

similar to that presented here in that the attempted explanation of the respondent vessel owner failed to disclose any cause of the damage. The Court pointed out that this led to an inference that the facts had not been fully disclosed. The Court adopted the language of Judge HOFFMAN in *The Compta* (D. C. Cal.), 4 Sawy. 375, Fed. Cas. No. 3069.*

Since the evidence which respondent offered in the case at bar to rebut the presumption was not sufficient for that purpose, it is submitted that the presumption persisted and the Circuit Court of Appeals should have accepted the conclusion of the District Court that the barge sank because she was unseaworthy (Conclusion 1, R. 280).

IV

A shipowner can and must know at his own peril the condition of the vessel in which he proposes to carry the goods of other people; while the cargo owner is under no obligation to look after such matter. Hence the burden of proving that the vessel was in fact seaworthy rests upon the vessel owner and he must lay any doubts as to her fitness to perform the voyage which he had undertaken that she would perform safely.

As we have shown above, the principle promulgated by the Circuit Court of Appeals in the case at bar results, in every instance where the vessel owner offers any testimony as to the cause of the loss, no matter how valueless and ill-founded such testimony may be, in a complete nullification of the presumption of unseaworthiness long recognized

* Cited with approval by this court, *The Folmina*, 212 U. S. 354, 363.

to arise from uncontradicted proof of a vessel's sinking in smooth water without apparent cause and without external contact with any object. Under the ruling made by the Circuit Court of Appeals herein, the cargo owner under such circumstances cannot rely on the inference of unseaworthiness arising from an unexplained sinking in smooth water, but must bear the burden of affirmatively proving specific items of unseaworthiness. In other words, it must offer precise evidence as to facts which are peculiarly, and often solely, within the vessel owner's own knowledge. It has often been recognized that the seaworthiness or unseaworthiness of a vessel is determined by facts of this class. For example, this Court long ago in *The Northern Belle*, 76 U. S. (9 Wall.) 526, in discussing (p. 529) "the duty or obligation which the law imposes upon the owners" of a vessel "as to seaworthiness or fitness to perform the voyage which her owners had undertaken that she should perform safely," pointed out at page 529:

> "This duty is one which must obviously belong exclusively to the carrier. He can and must know, at his own peril, the condition of the barge in which he proposes to carry the goods of other people; while the owner of the cargo is under no obligation to look after this matter, and has no means of obtaining any sure information if he should attempt it."

For a recent restatement of this principle, see *Schnell* v. *The Vallescura*, 293 U. S. 296, where Mr. Justice Stone wrote, at pages 303-304:

> "In general the burden rests upon the carrier of goods by sea to bring himself within any exception relieving him from the liability which the law otherwise imposes on him. This is true at common law with respect to the exceptions which the law itself annexed to his undertaking, such as his immunity

from liability for act of God or the public enemy. See Carver, Carriage by Sea (7th ed.), Chap. I. The rule applies equally with respect to other exceptions for which the law permits him to stipulate. *Clark* v. *Barnwell*, 12 How. 272, 280; *Rich* v. *Lambert*, 12 How. 347, 357; *The Propeller Niagara* v. *Cordes*, 21 How. 7, 29; *The Maggie Hammond*, 9 Wall. 435, 459; *The Edwin I. Morrison*, 153 U. S. 199, 211; *The Folmina*, 212 U. S. 354, 361. The reason for the rule is apparent. He is a bailee entrusted with the shipper's goods, with respect to the care and safe delivery of which the law imposes upon him an extraordinary duty. Discharge of the duty is peculiarly within his control. All the facts and circumstances upon which he may rely to relieve him of that duty are peculiarly within his knowledge and usually unknown to the shipper. In consequence, the law casts upon him the burden of the loss which he cannot explain or, explaining, bring within the exceptional case in which he is relieved from liability. See *Bank of Kentucky* v. *Adams Express Co.*, 93 U. S. 174, 184; *Chicago & Eastern Illinois R. Co.* v. *Collins Produce Co.*, 249 U. S. 186, 192, 193; *Railroad Co.* v. *Lockwood*, 17 Wall. 357, 379, 380."

See also *The Wildcroft*, 201 U. S. 378, at pages 388-9.

In *The John Twohy* (C. C. A. 3), 279 F. 343, 344, modified by this Court because the Circuit Court of Appeals failed to give cargo a full recovery (255 U. S. 77), the Circuit Court of Appeals for the Third Circuit held:

"The libellant's first claim is for damages to the cargo. The schooner's liability arises from her warranty of seaworthiness, *The Edwin I. Morrison*, 153 U. S. 199, 14 Sup. Ct. 823, 38 L. Ed. 688, under the obligation of shipowners to provide a seaworthy vessel unless by the terms of the charter-party they limit their obligation to the exercise of due care to

make her so. *The Carib Prince*, 170 U. S. 655, 18 Sup. Ct. 753, 42 L. Ed. 1181; *The Wildcroft*, 201 U. S. 378, 26 Sup. Ct. 467, 50 L. Ed. 794. There was nothing in the charter-party limiting this obligation. *Therefore the burden of affirmatively proving her seaworthiness at the commencement of the voyage, as well as sustaining the defense that the damage to the cargo was due to perils of the sea within exceptions of the charter-party and bill-of-lading, rests upon the owners. International Navigation Co.* v. *Farr & Bailey Co.*, 181 U. S. 218, 21 Sup. Ct. 591, 45 L. Ed. 830; *The Wildcroft, supra.* We find the owners have not sustained this burden." (Italics ours.)

In *Gardner* v. *Dantzler Lumber & Export Co., Inc.* (C. C. A. 5), 98 F. (2d) 478, 479, the Circuit Court of Appeals for the Fifth Circuit said:

> "The burden was on respondents (vessel owners) to prove she was seaworthy."

See also *O. Y. Tonnage, A. B.* v. *Texas Co.* (C. C. A. 5), 296 F. 893, 896; *Companhia Naviera Mexicana, S. A.* v. *Sporl* (C. C. A. 5), 11 F. (2d) 777.

To the same effect is *The Indien* (C. C. A. 9), 71 Fed. (2d) 752, at page 755, where the Court said:

> "*At the outset, it must be borne in mind that the burden of proving the vessel's seaworthiness rests upon the shipowner.* Any doubt must be resolved against him, 'with the presumption in favor of the appellee that it was the fault of the appellant.' *The Jeannie* (C. C. A. 9), 236 F. 463, 470." (Italics ours.)

We have found no case anywhere which supports the decision of the Circuit Court of Appeals for the Second Circuit in the instant case, to the effect that after it has

been shown that a vessel sinks in calm water, without known cause, the burden of proof is upon the cargo-owner to show unseaworthiness specifically.

Even the decisions in the Second Circuit do not support the decision below.

In *The Cullen No. 32*, 62 F. (2d) 68, affirmed *sub. nom. Cullen Fuel Co.* v. *Hedger Co.*, 290 U. S. 82, the Court said (p. 69):

> "The owner has the burden of proving seaworthiness when the barge was delivered under her charter. *Taylor Bros. Lumber Co.* v. *Sunset Lighterage Co.*, 43 F. (2d) 700 (C. C. A. 2). We agree with the District Court that the Cullen Company has not carried that burden."

In *The Phoenicia** (S. D. N. Y.), 90 F. 116, aff'd (C. C. A. 2), 99 F. 1005, Judge Addison Brown said, at page 119:

> "A further question arises upon whom the burden of proof in this respect rests; and in case of doubt, whether the ship or the merchant shall bear the loss. Upon the latter point, the law, as I understand it, is that the burden of proof rests upon the ship. In *The Edwin I. Morrison*, 153 U. S. 199, 211, 215, 14 Sup. Ct. 823, the decision turned essentially upon this principle. It was there repeatedly stated by Chief Justice Fuller in delivering the opinion of the Court, that it is for the owners to show affirmatively the safety and sufficiency of the ship's condition when she sails, by making all ordinary and reasonable tests."

In *U. S. Metals Refining Co.* v. *Jacobus* (C. C. A. 2), 205 F. 896, the Circuit Court of Appeals affirmed by *per*

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* Cited with approval by this Court, *The Folmina*, 212 U. S. 354, 363.

curiam opinion the decision of HOLT, *D. J.* in a case quite similar on its facts to the present case, in which the District Judge said (pp. 896, 897):

> "Now, it is quite natural that the owners of this barge should have supposed that she was in good order, but the rule is fundamental that in contracts of affreightment the vessel must be seaworthy. It is not of any consequence whether the owner supposed it was seaworthy, or whether he had used his best efforts to ascertain whether she was seaworthy. It is an absolute requirement that she be seaworthy, based on the ground of public policy. The ordinary cargo owner does not know, and has no means of knowing, the condition of the vessel, and the owner is bound to have a vessel that is seaworthy at the beginning of the voyage."

In the case of *Societa Anonima Cantiero Olivo* v. *Fed. Ins. Co.* (C. C. A. 2), 62 F. (2d) 769, cert. denied 289 U. S. 759, the action was by the shipowner against the cargo owner for contribution in general average. The affirmative defense of the cargo owner was that the ship was unseaworthy. The testimony on the issue of unseaworthiness was "confused" and "inconclusive." The Court cited the decisions of this Court including the *Edwin I. Morrison, supra*, establishing the presumption of unseaworthiness because of a breakdown of machinery under circumstances under which such an accident should not have occurred. The Court reviewed the authorities with respect to the burden of proof on the issue of seaworthiness and said at page 771:

> "Judge WARD decided flatly that the burden was on the ship in *The Lewis H. Goward* (D. C.) 34 F. (2d) 791, following the analogy of suits on contracts of affreightment. We reserved the points in

> *Spang Chalfant & Co.* v. *Dimon S. S. Corp.*, 57 F. (2d) 965, but we cannot do so here. *It seems to us that the rule should be the same as in suits for cargo damage, and that the burden is upon the ship, and remains so throughout.* That she may start with a presumption in her favor, we need not deny. *Franklin Sugar Refining Co.* v. *Funch, Edye & Co.*, 73 F. 844 (C. C. A. 3). If so, the failure of so vital a part of her machinery in weather which it should withstand, if staunch, is all that the cargo is called upon to prove. *Thereafter she must prove her general fitness, and will fail upon the issue, if the evidence is in balance.*" (Italics ours.)

The practical reason for throwing upon a shipowner the burden of showing seaworthiness when a vessel sinks without known cause while loading, has also been recognized by the English Courts. Thus in *Cohn* v. *Davidson*, 2 Q. B. D. 455, at page 462, it is said:

> "The ship is, during her stay in port, and whilst loading, and when she sets sail on her voyage, in the custody and possession and under the control of the master and crew, and it is most reasonable and convenient to impose upon those, who have the best means of knowing, the duty of ascertaining her condition at that critical time when she is about to meet the perils, which it is the object of all parties that she should be prepared to meet."

V.

After it has been shown that a vessel leaks from some unknown cause while loading, or shortly after the voyage begins, a *prima facie* case of unseaworthiness is made out. If the shipowner intends to rebut such a *prima facie* case by proof as to the actual condition at the time of sailing, he will be held to strict proof to establish actual seaworthiness. He will not be permitted to substitute visual examination for known tests, and any doubts as to unseaworthiness should be resolved against the shipowner.

In *The Edwin I. Morrison,* 153 U. S. 199, a suit on a warranty of seaworthiness contained in a charter party, cargo had been damaged by seawater which had found its way into the vessel through a sounding pipe, which led to the weather deck. The pipe was fitted with a cap and plate as a cover. This cap and plate became dislodged during a storm, and in consequence, seawater which came on deck entered the vessel and damaged cargo. Before the ship left port both the cap and plate had been given such examination as a reasonably prudent master or owner might be expected to give them. Although tapping with a hammer or unscrewing the cap might have developed any insecurity (if there were any), this was not done (Findings XI and XII, 153 U. S. at p. 213). The cap and plate were examined after they gave way. At that time the wood, to which the plate had been fastened, looked white and sound, the screw holes were not smooth, not black nor rusty, nor did the wood look rotten. The timber into which the plug was driven and on which the lead was nailed, was found solid. No marks of violence other than the splintering of the wood about the screw-holes were visible. The

weather was no more than what was to be expected upon the voyage. On these facts this Court held that the inference was that the cap and plate were carried away because of unseaworthiness. The Court was of opinion that respondents had failed in their case because they had failed to establish seaworthiness. It said (p. 212):

> "The burden was upon them [the shipowner] to show seaworthiness, and if they did not do so, they failed to sustain that burden, even though owners are in the habit of not using the precautions which would demonstrate the fact. In relying upon external appearances in place of known tests, respondents took the risk of their inability to satisfactorily prove the safety of the cap and plate if loss occurred through their displacement.
>
> We are unwilling, by approving resort to mere conjecture as to the cause of the disappearance of this cap and plate, to relax the important and salutary rule in respect of seaworthiness. The *Reeside*, 2 Sumner, 567, 574; *Douglas* v. *Scougall*, 4 Dow. H. L. 269." (*The Edwin I. Morrison*, 153 U. S. 199, 215.)
>
> "In any aspect, the real point in controversy is, *did the respondents so far sustain the burden of proof which was upon them* as to render the probability that the cap and plate were in good condition and knocked off through extraordinary contingencies so strong as to overcome the inference that they were not in condition to withstand the stress to which on such a voyage it might reasonably have been expected they would have been subjected? *If the determination of this question is left in doubt, that doubt must be resolved against them*" (*The Edwin I. Morrison*, 153 U. S. 199, 212). (Italics ours.)

In *The Southwark*, 191 U. S. 1, 15, 16, this Court repeated the statement it had made in the *Morrison* case. It said (p. 15):

> "The burden was upon the owner to show by making proper and reasonable tests that the vessel was seaworthy and in a fit condition to receive and transport the cargo undertaken to be carried, and *if by the failure to adopt such tests and to furnish such proofs the question of the ship's efficiency is left in doubt, that doubt must be resolved against the ship owner and in favor of the shipper.*" (Italics ours.)

The foregoing general rule has often been applied by the lower Federal Courts. For example, in *Nord-Deutscher Lloyd* v. *Ins. Co. of North America*, 110 Fed. 420, the Circuit Court of Appeals for the Fourth Circuit said, at page 425:

> "The ship must be really fit to undergo the perils of the sea and other incidental risks to which she may be exposed. The obligation of due diligence to make the ship seaworthy is in all respects the same as before the Harter act, which does not establish any new rule of diligence. The shipowner cannot now, any more than before, rely upon external appearances in place of known tests, nor can the mere selection of competent persons to inspect satisfy the requirement of due diligence."

See also to like effect:

The R. P. Fitzgerald, 212 Fed. 678, 686-7 (C. C. A. 6th) certiorari denied 234 U. S. 757;

Compagnie Maritime v. *Meyer*, 248 Fed. 881, 883-5 (C. C. A. 9th);

The Charlton Hall, 285 Fed. 640, 642 (S. D. N. Y.);

The Leerdam, 8 F. (2d) 295, 296, affd. 17 F. (2d) 586 (C. C. A. 5th);

Warner Sugar Ref. Co. v. *Munson S. S. Co.*, 23 F. (2d) 194, 197, affd. 32 F. (2d) 1021 (C. C. A. 2nd);

The Phoenicia, 90 F. 116; affirmed (C. C. A. 2) 99 F. 1005.

In the case at bar, counsel for the shipowner contended that evidence showing what was usually done to ascertain seaworthiness is sufficient. This Court in *The Edwin I. Morrison*, 153 U. S. 199, rejected that argument. It held that it was unwilling to relax the rule which required that the shipowner demonstrate the fact of seaworthiness. So also here the rule should not be relaxed, and if respondent's proofs leave the question of the barge's seaworthiness in doubt, that doubt must be resolved against the respondent. *The Southwark*, 191 U. S. 1, 15, 16. *The Wildcroft*, 201 U. S. 378, 389.

It may be mentioned that the District Court, in the case at bar, found that the inside of the cargo tanks of the barge before loading were covered with a skin of molasses (Finding 26, R. 273). There was evidence that because of this coating of molasses, some 1500 short rivets could not be properly tested (R. 193-194). It is not even contended that these rivets were ever tested with a hammer as they should have been (R. 194). The failure of respondent to use known tests to ascertain the seaworthiness of the barge, destroys the respondent's case.

VI.

Owners of goods carried by water when they agree to insure such goods for the account of the carrier and to relieve the carrier from loss in respect of which insurance has been or could have been effected, do not agree to insure the carrier against the carrier's personal obligation to supply a seaworthy ship, nor do they agree to relieve the carrier from liability for losses caused by unseaworthiness.

In addition to the warranty of seaworthiness quoted (*ante*, p. 9) and already discussed in this brief (*ante*, pp. 9-12), the contract of carriage contained the following provision:

> "It is agreed that the Dunbar Molasses Corporation shall insure the cargoes carried by the New York Tank Barge Co., Inc., in its own, or chartered or operated barges, for the account of New York Tank Barge Co., Inc. and/or the owners of such barges; and that neither the New York Tank Barge Co., Inc., nor such barges shall be liable for any loss in respect of which insurance has been or could have been effected" (Finding 43, R. 278).

It is to be noted that this is a double-barreled clause. It is more than a mere agreement on the part of the shipper to insure the cargo for the account of the vessel owner. It goes further and purports to exempt the vessel owner from liability "for any loss in respect of which insurance has been or could have been effected."

The District Court held that, although the barge "T. N. No. 73" was unseaworthy (Conclusion 1, R. 280)

and the warranty of seaworthiness was personal, *Pendleton* v. *Benner Line*, 246 U. S. 353; *Luckenbach* v. *W. J. McCahan Sugar Refining Co.*, 248 U. S. 139, and for that reason the respondent could not limit its liability for such breach (Conclusions 2 and 3, R. 280, 281), the petitioner could not recover from the respondent. It held that petitioner had not satisfied the provision of the contract of affreightment which we have just quoted, because the petitioner did not insure the cargo for the account of respondent (Finding 47, R. 280; Conclusions 6-15, R. 281-285). The effect of such ruling was to exempt the respondent vessel owner from liability for a loss caused by the breach of its express warranty of seaworthiness.

Petitioner appealed from this decision of the District Court to the Circuit Court of Appeals. That Court, however, concluded that since petitioner had not proved its case on the question of unseaworthiness, it was "not necessary to pass upon that question" (R. 297).

This question is presented to this Court in the Petition for a Writ of Certiorari as No. 4 of The Questions Presented in the Petition (Petition, p. 10). It comes here, for the reasons stated, without the benefit of the views of the Circuit Court of Appeals.

The warranty of seaworthiness is contained in a policy of marine insurance, even a policy on goods, as well as in a contract of affreightment.

We extract the following from *The Caledonia*, 157 U. S. 124, 132, where this Court quoted the following from *Kopitoff* v. *Wilson*, 1 Q. B. D. 377, 379, 381:

> "It is well and firmly established that in every marine policy the assured comes under an implied

warranty of seaworthiness to his assurer, and if we were to hold that he has not the benefit of a similar implication in a contract which he makes with a shipowner for the carriage of his goods, the consequence would be that he would lose that complete indemnity against risk and loss, which it is the object and purpose to give him by the two contracts taken together. Holding as we now do, the result is, that the merchant, by his contract with the shipowner, having become entitled to have a ship to carry his goods warranted fit for that purpose, and to meet and struggle against the perils of the sea, is, by his contract of assurance, protected against the damage arising from such perils acting upon a seaworthy ship."

This Court then said (157 U. S. at pp. 132-133):

"This was the view expressed by Mr. Justice BROWN, then District Judge, in *The Eugene Vesta*, 28 Fed. Rep. 762, 763, in which he said: 'There can be no doubt that there is an implied warranty on the part of the carrier that his vessel shall be seaworthy, not only when she begins to take cargo on board, but when she breaks ground for the voyage. *The theory of the law is that the implied warranty of seaworthiness shall protect the owner of the cargo until his policy of insurance commences to run; and, as it is well settled that the risk under the policy attaches only from the time the vessel breaks ground, this is fixed as the point up to which the warranty of seaworthiness extends.*' And the case of *Cohn v. Davidson*, 2 Q. B. D. 455, 461, was cited, where it appeared that the ship was not in fact seaworthy at the time she set sail, but that as she was found to be seaworthy at the time she commenced to take cargo, she must have received the damage in the course of loading; and FIELD, *J.*, observed that 'no degree of seaworthiness for the voyage at any time anterior to the commencement of the risk will be of

any avail to the assured, unless that seaworthiness existed at the time of sailing from the port of loading. As, therefore, the merchant in a case like the present would not be entitled to recover against his underwriter by reason of the breach of warranty in sailing in an unseaworthy ship, it would follow that, if the warranty to be implied on the part of the shipowner is to be exhausted by his having the ship seaworthy at an anterior period, the merchant would lose that complete indemnity, by means of the two contracts taken together, which it is the universal habit and practice of mercantile men to endeavor to secure.'

The reasons for the strict enforcement of the warranty, in insurance, have frequently been commented on.

In *Douglas* v. *Scougall*, 4 Dow. 269, 276, Lord ELDON said: 'I have often had occasion to observe here, that there is nothing in matters of insurance of more importance than the implied warranty that a ship is seaworthy when she sails on the voyage insured; and I have endeavored, both with a view to the benefit of commerce and the preservation of human life, to enforce that doctrine as far as, in the exercise of sound discretion, I have been able to do so. It is not necessary to inquire, whether the owners acted honestly and fairly in the transaction; for it is clear law that, however just and honest the intentions and conduct of the owner may be, if he is mistaken in the fact, and the vessel is in fact not seaworthy, the underwriter is not liable.'" (*The Caledonia*, 157 U. S. 132, 133.) (Italics ours.)

It is clear from these statements that, if a merchant who wishes to insure his goods is deprived of a warranty of seaworthiness in a contract of affreightment, he may find himself without any indemnity against loss. If it should turn out that the vessel was unseaworthy, his insurance would be void because the warranty of seaworthi-

ness in the policy would have been breached. For this reason the merchant must look to the shipowner to abide by his warranty of seaworthiness in the contract of affreightment. It follows that the reasonable construction to be given to the contract between petitioner and respondent is that the agreement to insure is conditioned upon the respondent supplying a seaworthy ship, and that the insurance provision does not modify in any way the shipowner's liability for failure to supply a seaworthy ship. Such a construction recognizes that the requirement as to seaworthiness is "based on the ground of public policy" —*U. S. Metals Refining Co.* v. *Jacobus*, 205 F. 896 (C. C. A. 2nd); *cf. The Kensington*, 183 U. S. 263, at page 269—and recognizes that this warranty is for "the benefit of commerce and the preservation of human life"—*Douglas* v. *Scougall*, 4 Dow. 269, 276. It is the warranty of seaworthiness in the contract of affreightment which "shall protect the owner of the cargo until his policy of insurance commences to run", per Mr. Justice Brown in *The Eugene Vesta*, 28 Fed. 762, 763, cited and quoted with approval by this Court in *The Caledonia, supra.*

This Court has always been keenly alive to the importance of this personal warranty of seaworthiness and it has guarded it even against its being cut down by the provisions of the Limitation of Liability statute—*Cullen Fuel Co., Inc.* v. *W. E. Hedger, Inc.*, 290 U. S. 82; *Luckenbach* v. *W. J. McCahan Sugar Refining Co.*, 248 U. S. 139; *Pendleton* v. *Benner Line*, 246 U. S. 353.

It will not do to suggest that there is a common practice for a merchant and his underwriter to agree that the vessel which is to carry the goods may be considered seaworthy (R. 238). That practice is merely one of convenience, so as to relieve a merchant from the embarrassment of deciding whether to press his claim against the shipowner or

against the underwriter. *Luckenbach* v. *McCahan Sugar Refining Co.*, 248 U. S. 139, 145, 149. The policies here which provided that the barge should be considered seaworthy as between the merchant and the underwriter also contained a provision that the insurance should not inure to the benefit of any carrier (Finding 44, R. 279). The system thus provided for in the policies is discussed in *Arnould on Marine Insurance* (12th Ed.), § 689, to which the editors of Arnould append a note:

> "For some time past it has been the practice of underwriters on cargo not to set up the defense of unseaworthiness of the ship, *but to pay the loss and avail themselves by subrogation of the assured's remedies against the shipowner.* This practice does not modify the rule of law stated in the text" (p. 899). (Italics ours.)

Incidentally, clauses in a bill of lading evidencing a contract for the carriage of goods by sea in foreign trade which give the carrier the benefit of the cargo owner's insurance have now been declared by Congress to be "null and void and of no effect." *Carriage of Goods by Sea Act*, 46 U. S. Code, Sec. 1303, sub. 8; 49 Stat. 1208.

If, however, the underwriter on goods should be prevented from asserting a claim by subrogation for a loss due to unseaworthiness in consequence of a construction of an insurance clause such as that approved by the District Court, then the merchant would probably find himself confronted with either an inability to obtain insurance or a heavy increase in premium. In *Luckenbach* v. *McCahan Sugar Refining Co.*, 248 U. S. 139, 145-149, this Court, speaking through Mr. Justice BRANDEIS, reviews the system adopted by merchants in dealing with a case of this character. The court discusses particularly the loan device mentioned in Finding 46 (R. 280). In concluding its discussion, this Court said:

> "It is creditable to the ingenuity of business men that an arrangement should have been devised which is consonant both with the needs of commerce and the demands of justice" (248 U. S. at p. 149).

But we submit that the construction of the contract adopted by the District Court is clearly wrong. The whole agreement must be regarded and "must be construed according to the intent of the parties as manifested by the whole instrument, rather than by the literal meaning of any particular clause, taken by itself." *Crossman* v. *Burrill*, 179 U. S. 100, at page 107, another charter party case. If the view of the District Court is adopted, then the whole agreement is not regarded, and under the construction of the District Court, the express warranty of seaworthiness becomes surplusage and the parties wasted their time when they inserted that clause in the contract. It is elementary that in interpreting any contract the intent of the parties controls. Obviously, the parties intended that both provisions should be given effect; otherwise they would not have been inserted in the contract. The natural construction to be placed upon the contract is that they intended that the insurance liability should not be made effectual until the barge-owner had fulfilled his obligation under the contract of affreightment. *The Eugene Vesta*, 28 Fed. 762, 763; *Kopitoff* v. *Wilson*, 1 Q. B. D. 377, 381. Following similar reasoning, the Courts have not found any difficulty in giving effect to both the warranty of seaworthiness and to insurance provisions.

The House of Lords in *Nelson Line, Ltd.* v. *James Nelson & Sons, Ltd.*, 1908 A. C. 16, affirming (1907) 1 K. B. 769 (C. A.), considered a case on all fours with the present case. In that case an agreement that shipowners should not be

> "liable for any damage or detriment to the goods which is capable of being covered by insurance, or which has been wholly or in part paid for by insurance" **(at p. 19)**

was coupled with another provision placing upon shipowners the responsibility to take

> "all reasonable means * * * to provide against unseaworthiness" [(1907) 1 K. B. at p. 778].

Both the Court of Appeal and the House of Lords held that the provision first quoted did not relieve the shipowner from the duty to provide a seaworthy vessel. Both Courts held that the shipowner was liable for the damage which resulted from his failure to do so. In his opinion in the House of Lords, Lord Loreburn, *L. C.*, said:

> *"If the words are considered by themselves, they seem to excuse the shipowners not merely from this, but from any imaginable liability,* except such as by law cannot be underwritten. They run as follows: 'The owners not being liable for any damage or detriment to the goods which is capable of being covered by insurance, or which has been wholly or in part paid for by insurance.'
>
> *But the whole agreement must be regarded, and especially the context of the clause in which this alleged exemption occurs. The words in question do not stand by themselves. They are at the end of a very long sentence, the earlier part of which is wholly without effect if the last part means what the defendants maintain.*
>
> * * * * * * *
>
> The law imposes on shipowners a duty to provide a seaworthy ship and to use reasonable care. They may contract themselves out of those duties, but unless they prove such a contract the duties remain; and such a contract is not proved by producing language which may mean that and may mean some-

> thing different. As Lord MACNAGHTEN said in *Elderslie Steamship Co.* v. *Borthwick*, 1905 A. C. 93, at p. 96, 'an ambiguous document is no protection.' That is the ground on which I rest my opinion" (1908 A. C. 16, 19). (Italics ours.)

In the same case in the Court of Appeal, (1907) 1 K. B. 769, FLETCHER MOULTON, *L. J.*, spoke of the "fundamental obligation to supply a seaworthy ship" (at p. 781) and COLLINS, *M. R.*, remarked that the insurance clause ought not to be applied as a limitation of the warranty of seaworthiness.

Precisely the same result was reached in *Sanbern* v. *Wright & Cobb Lighterage Co.*, 171 F. 449, 454, affirmed on opinion of the District Judge by the Circuit Court of Appeals for the Second Circuit, 179 F. 1021.

For the reasons which prevailed in these cases the insurance clause here ought not to be applied as a limitation on the warranty of seaworthiness.

The general principle is "that a shipowner desiring to protect himself from liability for the unseaworthiness of his ship must do so in clear and unambiguous terms, intelligible to ordinary business men." *Ingram & Royle, Ltd.* v. *Services Maritimes du Treport*, (1913) 1 K. B. 538, 546, 547, and the cases therein cited by SCRUTTON, *L. J.*

The foregoing cases are but applications of a settled rule of construction repeatedly announced by this Court, viz.:

> "The warranty of seaworthiness is implied from the circumstances of the parties and the subject-matter of the contract and may be negatived only by express covenant." *Cullen Fuel Co.* v. *W. E. Hedger, Inc.*, 290 U. S. 82, 88.

In *The Caledonia*, 157 U. S. 124, at page 137, this Court said:

> "As is well said by counsel for appellee, the exceptions in a contract of carriage limit the liability but not the duty of the owner, and do *not, in the absence of an express provision, protect the shipowner against the consequences of furnishing an unseaworthy vessel*. *Steel* v. *State Line Steamship Company*, 3 App. Cas. 72; *Gilroy* v. *Price*, App. Cas. (1893) 56; *The Glenfruin* 10 P. D. 103; *Kopitoff* v. *Wilson*, 1 Q. B. D. 377; *Tattersall* v. *National Steamship Company*, 12 Q. B. D. 297; *Thames & Mersey Ins. Company* v. *Hamilton*, 12 App. Cas. 484, 490. *If the exceptions are capable of, they ought to receive*, to use the language of Lord SELBORNE in *Steel* v. *Steamship Company*, *'a construction not nullifying and destroying the implied obligation of the shipowner to provide a ship proper for the performance of the duty which he has undertaken'* " (157 U. S. at p. 137). (Italics ours.)

Again in *The Carib Prince*, 170 U. S. 655, at 659, this Court said:

> "In other words, that where the owner desires the exemption to cover a condition of unseaworthiness existing at the commencement of the voyage, he must unequivocally so contract" (170 U. S. at p. 659).

To the same effect see in particular *The Framlington Court* (C. C. A. 5), 69 F. (2d) 300, at pages 303 and 304, where a charter party clause giving the ship liberty to sail without a pilot was held to be inconsistent with the warranty of seaworthiness and to afford the shipowner no defense where a failure to employ a local pilot rendered the vessel unseaworthy at the beginning of the voyage. See also *Franklin Fire Ins. Co.* v. *Royal Mail Steam Packet Co.* (C. C. A. 2), 58 F. (2d) 175, where the Court, in speaking of an exception against unseaworthiness, held:

> "Hence we hold that the exception did not cover a breach of the implied covenant, and that if the ship was in fact unseaworthy when she lifted the coffee, she was liable" (58 F. (2d) at p. 176).

In *Carver on Carriage of Goods by Sea*, 8th Ed., Sec. 105, page 182, it is said with reference to an insurance clause in a contract of carriage:

> "Such a clause (where admissible) will not generally relieve the shipowner from liability for consequences of unseaworthiness of the ship, or of negligence of the crew."

Compare *Price* v. *Union Lighterage Company*, (1904) 1 K. B. 412, 414; *The Titania*, 19 F. 101; *The Hadji*, 20 F. 875; *The Egypt*, 25 F. 320; *The Anna*, 223 F. 558; *The Turret Crown*, 297 F. 766.

A fair and reasonable effect should be given to the express warranty of seaworthiness. That warranty and the insurance provision can be readily reconciled within the established principles of interpretation applicable to this case, by holding (a) that the respondent is entitled to the benefit of the insurance clause only if, as, and when it has fulfilled its obligation under the express warranty of seaworthiness; or (b) that the insurance clause applies only to losses other than those arising from breach of the express warranty of seaworthiness. In either event, the result is the same, viz.; that the insurance clause has no application where there is a loss resulting from unseaworthiness.

It would be most unfair and against public policy if the respondent, after breaching the fundamental obligation of its contract to furnish a seaworthy vessel and to see that the vessel was maintained in that condition throughout the life of the contract, should, nevertheless, be able to require

the petitioner to insure the vessel owner against loss as the result of such breach and should be wholly exempt from liability for breach of his fundamental warranty of seaworthiness if no insurance against such type of loss was effected by the cargo owner for the benefit of the vessel owner.

We submit that the rules for the construction of such contracts as laid down by this Court, as well as the intentions sought to be expressed by the parties, require the construction that the two coordinate clauses of the contract, that is, the express warranty of seaworthiness and the insurance clause, should each be given effect within their respective spheres.

Much was said below of an alleged breach of the agreement on the part of the petitioner to insure the cargo for the account of respondent. This argument is without substance. There was no agreement on the part of your petitioner to insure the cargo for the account of the respondent *with respect to losses due to unseaworthiness of the barge.* Since unseaworthiness was the cause of the loss of the petitioner's cargo in this case, as found by the District Court, there was no breach of this agreement.

In Conclusion 14 (R. 284), the District Court says:

> "The barge owner had the right to assume that the insurance clause in the contract of carriage meant just what it said, without any implied exceptions"

and adds that your petitioner

> "has only itself to blame if it failed in its obligation to effect insurance for the account of the barge owner" (R. 284).

We submit that these statements of the District Court not only beg the entire question, but also are contrary to

the evidence which shows that the barge owner had his own insurance.

We make this last statement despite Conclusion 15 (R. 284) where the District Court states that the vessel owner having warranted the seaworthiness of the barges to your petitioner, would be most desirous of obtaining insurance to cover such a contingency, and that *the failure of your petitioner to obtain insurance for the vessel owner's account has left it without insurance* (Conclusion 14, R. 284).

Respondent's own witness in response to a query from the Court conceded that respondent had P. & I. insurance policies. When questioned by the Court as to what they covered, respondent's counsel stated: "They would be the policy interested in cargo damage" (R. 160). This same witness, a surveyor who made examinations of the barge on behalf of the P. & I. underwriters who insured respondent against liability for cargo damage (R. 154, 155, 156), conceded that "T. N. No. 73" was "entered with" his company (R. 155). From this uncontradicted testimony it is apparent that the *statement of the District Court that the vessel owner had been left without insurance by reason of the failure of cargo to obtain insurance for the vessel owner's account is contrary to the fact.*

Unfortunately the District Court, throughout its opinion and findings, seems to have confused cargo insurance with P. & I. (protection and indemnity) insurance. Cargo insurance is insurance on goods and is designed to protect anyone interested in the goods against loss due to damage which may be done to the thing insured; whereas P. & I. insurance is insurance against liability, usually the liability of a vessel owner for personal injury or damage to goods.

Both branches of the insurance clause contained in the ontract of affreightment in suit (Finding 43, R. 278), re- ate to cargo insurance. The clause first provides that etitioner "shall insure *the cargo*"; secondly, it provides hat respondent shall not be liable for "*any loss* in respect f which insurance has been or could have been effected." t was not contemplated, as we have shown above, that ither of these provisions should relieve the respondent rom its fundamental obligation to supply a seaworthy hip. Respondent must have been aware of that fact for t took out P. & I. insurance on its own behalf (R. 153, 54). There is no implied warranty of seaworthiness in P. & I. policy. *Sorenson* v. *Boston Ins. Co.*, 20 F. (2d) 40.

In its Conclusion 7 (R. 281), the District Court unfor- unately confused these two types of insurance, viz., insur- nce of a *res* and insurance against liability.

Respondent offered no evidence, nor is there any in this ecord, which would justify a finding (nor did the Dis- rict Court make any) that petitioner could have obtained argo insurance for the account of respondent which would ave protected respondent in the case of a loss by rea- on of unseaworthiness. The obvious inference from this ircumstance is that such insurance could not have been btained. The reasons why such cargo insurance could ot be obtained are that policies against loss and damage o cargo do contain a warranty of seaworthiness (*supra*, p. 41-43).

The District Court was clearly wrong in holding that the insurance provision offered any protection to respond- nt with respect to this loss occasioned by its breach of its warranty of seaworthiness.

Conclusion

Since the loss resulted from unseaworthiness, the decrees of both courts below should be reversed and a decree should be entered in favor of the petitioner against the respondent for its damages with interests and with costs both in this court and in the courts below.

D. Roger Englar,
T. Catesby Jones,
Leonard J. Matteson,
Ezra G. Benedict Fox,
Counsel for Petitioner.